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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/552,707	10/07/2005	Helmut D. Link	246472008500	6815
25227 7590 01/22/2009 MORRISON & FOERSTER LLP 1650 TYSONS BOULEVARD SUITE 400 MCLEAN, VA 22102				
EXAMINER				
SCHILLINGER, ANN M				
ART UNIT		PAPER NUMBER		
3774				
MAIL DATE		DELIVERY MODE		
01/22/2009		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/552,707

Applicant(s)

LINK ET AL.

Examiner

ANN SCHILLINGER

Art Unit

3774

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 09 October 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 2-6 and 9-13 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 2-6 and 9-13 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-8508)
Paper No(s)/Mail Date _____

- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(c) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 2-4, 6, 9, and 11 are rejected under 35 U.S.C. 102(e) as being anticipated by Pisharodi (US Pat. No. 6,610,093). Pisharodi discloses the following of the claimed invention: an intervertebral joint prosthesis (10) comprising an upper cover plate (22) with an upper surface; a lower cover plate (24) with a lower surface, where the lower surface has a central extent (center curved portion of element 24) and a lateral extent (left curved portion of element 24) in a coronal plane, the lateral extent extending from the central extent to a lateral side of the lower cover plate, the central extent protruding downward beyond the lateral extent, and the lateral extent having an incline relative to a transverse plane (see Figures 1-2). The prosthesis has portions (34) configured to engage the lateral edge zones of the end plates, and elevations and depressions (50) in the areas configured to engage the central areas of the end plates.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person

having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 5 and 12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Pisharodi. Pisharodi discloses the claimed invention except for the inclination measurements claimed by the Applicant. It would have been obvious to one having ordinary skill in the art at the time the invention was made to use the claimed inclination measurements, since it has been held that where the general conditions of the claim are disclosed in the prior art, discovering the optimum or workable ranges of the apparatus involves only routine skill in the art.

Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over Pisharodi in view of Michelson (U.S. Pat. No. 6,083,228). Pisharodi discloses the invention substantially as claimed, however, Pisharodi does not disclose an instrument set used to prepare the vertebral bodies to accommodate the prosthesis. Michelson teaches an intervertebral instrument set used to prepare the vertebral bodies to accommodate the prosthesis in col. 2, lines 12-47 and col. 7, lines 11-49 for the purpose of providing adequate space and support for the prosthesis. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to use an instrument set used to prepare the vertebral bodies to accommodate the prosthesis in order to provide adequate space and support for the prosthesis.

Claim 13 is rejected under 35 U.S.C. 103(a) as being unpatentable over Pisharodi in view of Errico et al. (U.S. Pub. No. 2003/0069586). Pisharodi discloses the invention substantially as claimed, however, Pisharodi does not disclose prosthesis with a width that is more than 1.63 times as great as the depth. Errico et al. teaches an intervertebral prosthesis with a width that is more than 1.63 times as great as the depth in paragraph 0016 for the purpose of allowing the prosthesis to fit properly within a correspondingly dimensioned intervertebral space. In addition,

Errico et al. indicates that the prosthesis may be given a plurality of width and depth combinations, to properly fit a particular patient. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to make a prosthesis with a width that is more than 1.63 times as great as the depth in order to allow the prosthesis to fit properly within a correspondingly dimensioned intervertebral space.

Response to Arguments

Applicant's arguments filed 10/9/2008 have been fully considered but they are not persuasive. The Applicant contends that the device of Pisharodi does not disclose lateral and central extensions being properly oriented with the coronal and transverse planes. The examiner respectfully disagrees. The limitations regarding the coronal and the transverse planes address only the intended use of the claimed device. Therefore, the Pisharodi reference may be implanted at any angle (i.e. as little as 1 degree) such that a central extent is located within the coronal plane. At any angle the traverse plane will cut through the top of the lateral extent and be at angle with Pisharodi's incline (element 40 that is located on element 24).

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37

CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ANN SCHILLINGER whose telephone number is (571)272-6652. The examiner can normally be reached on Mon. thru Fri. 9 a.m. to 4 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, David Isabella can be reached on (571) 272-4749. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/A. S./
Examiner, Art Unit 3774

/William H. Matthews/
Primary Examiner, Art Unit 3774